BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT W. GARRITY Claimant	)	
VS.	)	
BRIDGES Respondent	)	Docket No. 1,052,823
AND	)	
WESCO INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 9, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Samantha Benjamin-House, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

ALJ Moore found that claimant failed to establish that his need for additional medical treatment for his low back was causally related to his June 24, 2010, accident. The ALJ, accordingly, denied claimant's request for treatment to his low back and limited treatment to his right shoulder. Respondent was ordered to provide claimant with a list of two physicians from which claimant could chose an authorized physician to treat his right shoulder condition. If no list was provided, the ALJ held that claimant could designate his own authorized treating physician.

No preliminary hearing was held in connection with this order, but the ALJ did order an independent medical examination (IME) by Dr. Vito Carabetta and that report was considered by the ALJ in addition to the evidence previously submitted. The record on appeal consists of the transcript of the April 13, 2011, Preliminary Hearing and the exhibits; the discovery deposition of Robert W. Garrity taken November 29, 2010; and the IME report of Dr. Carabetta dated June 22, 2012, and filed with the Division on June 28, 2012; together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that his need for treatment to his low back is not causally related to his accident at work on June 24, 2010. Claimant argues ALJ Moore's Order is in direct contravention of the previous Order of ALJ Klein of June 24, 2011,[1] and the previous Order of the Board of August 18, 2011. Claimant also argues he was never provided the medical treatment ordered by Judge Klein in June 2011, and that respondent failed to provide him with a treating physician for his "affected body parts," as Dr. Chris Fevurly's examination of claimant on December 2, 2011, was an independent medical examination and not treatment. Claimant further argues the evidence shows that claimant's low back injury was caused by the work-related injury of June 24, 2010. Claimant also contends ALJ Moore erred by only requiring respondent to provide a list of two physicians from which he could choose an authorized treating physician, arguing that the Workers Compensation Act (Act) requires respondent to provide a list of three physicians.

Respondent contends ALJ Moore properly denied claimant's request for treatment to his low back, arguing the evidence in the record shows claimant had a preexisting low back injury. Respondent, however, argues ALJ Moore erred in finding claimant eligible for medical treatment to his right shoulder because the evidence in the record also shows claimant had a preexisting condition to his right shoulder. In addition, respondent argues claimant's current need for medical treatment to his right shoulder is the result of an intervening injury.

There is apparently no dispute but that claimant's need for treatment for his groin injury and complaints is compensable and necessary. The issues for the Board's review are:

(1) Is claimant's current need for medical treatment to his right shoulder and low back related to his work-related accident of June 24, 2010?

(2) Did claimant suffer an intervening injury to his right shoulder?

(3) Did the ALJ err by ordering respondent to provide claimant with a list of two physicians from which to choose an authorized treating physician, rather than providing claimant with a list of three physicians from which he could so choose?

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[1] Claimant's Application for Review and Brief to the Board state that the ALJ Klein's Order was dated April 13, 2011. However ALJ Klein's Order was dated June 24, 2011.

FINDINGS OF FACT

In this workers compensation claim, claimant was employed by respondent and, on June 24, 2010, had accompanied two of respondent's clients to a "buddy ball" game as part of his job. After the game, claimant was tackled by another one of respondent's clients, was knocked to the ground, and lost consciousness for a short time. Claimant testified in his deposition of November 29, 2010, that as a result of this incident he suffered injuries to his right shoulder, neck, middle and lower back, as well as a hernia. Respondent argued that claimant's activities during and after the buddy ball game did not arise out of and in the course of his employment. Further, respondent argued that claimant was engaged in horseplay with one of its clients at the time of the injury and therefore claimant's claim was not compensable. Respondent also argued that claimant failed to give it timely notice of his alleged accident.

A preliminary hearing was held in this matter on April 13, 2011. At that time, claimant was complaining of his hernia problem as well as pain in his shoulder, neck and mid-back. An IME report of Dr. Edward Prostic was attached as an exhibit. Dr. Prostic's report set out that claimant's greatest concern was his right groin but that he also reported pain in his right posterior hip and between his shoulder blades. Dr. Prostic concluded that on or about June 24, 2010, claimant had sustained injuries to his spine, right shoulder and right groin, including sprains and strains of his cervical and lumbar spine.

On June 24, 2011, ALJ Klein entered an Order concluding that claimant's accident arose out of and in the course of his employment and was not the result of horseplay. ALJ Klein further concluded that claimant's injuries were the result of a single date of accident of June 24, 2010, but concluded the "statutory" date of accident was October 4, 2010, the date claimant gave written notice, and further found that claimant gave respondent timely notice of his accident. ALJ Klein held: "The court finds that [respondent] is the responsible entity and appoints Dr. Lin for the hernia treatment. [Respondent] is ordered to choose an authorized treating physician for the other affected body parts."[2]

ALJ Klein's June 24, 2011, Order was appealed to the Board, and the issues were set forth as: Did claimant suffer a single date of accident on June 24, 2010, or a series of accidents beginning June 24, 2010, and continuing until his last day worked, July 30, 2010; did claimant provide Bridges with timely notice of his alleged accidental injuries from either a single date of accident of June 24, 2010, or a series through his last day worked; were claimant's activities at the time of his accident on June 24, 2010, within the course of his employment; did claimant's accident on June 24, 2010, arise out of his employment or was it instead the result of horseplay; if claimant suffered a series of accidents through his last day worked, is Bridges responsible for payment of benefits in this workers compensation claim? This Board Member, in an August 18, 2011, Order, held that ALJ Klein's Order was

[2] ALJ Order (June 24, 2011) at 2.

"modified to find that claimant's date of accident was June 24, 2010, and that claimant gave notice of accident within 10 days of June 24, 2010, but is otherwise affirmed."[3]

Claimant's attorney filed an Application for Preliminary Hearing on February 15, 2012, seeking additional medical treatment. Claimant contends that respondent never authorized the medical treatment ordered by Judge Klein. A preliminary hearing was held May 9, 2012, but no record was made of the hearing.[4] On May 10, 2012, ALJ Moore ordered respondent to pay claimant's authorized and related medical expenses incurred to date. In a separate Preliminary Hearing Order, ALJ Moore appointed Dr. Vito Carabetta as a neutral physician to perform an IME. Dr. Carabetta was asked to examine claimant, review pertinent medical records, and offer opinions as to diagnosis and recommendations for treatment. ALJ Moore's Preliminary Hearing Order further held that if Dr. Carabetta determined claimant to be at maximum medical improvement, Dr. Carabetta was to offer his opinion on claimant's permanent impairment of function. ALJ Moore further held:

> Claimant's preliminary hearing requests are taken under advisement pending an IME report from Dr. Carabetta. Counsel will have seven (7) days after receipt of the IME report to offer their written arguments/comments with respect to Claimant's preliminary hearing requests or to request further evidentiary hearing. If no written comments or request for hearing are received, the Court will proceed to enter an order.

Dr. Carabetta's June 22, 2012, report was received by the Division on June 28, 2012. Dr. Carabetta diagnosed claimant with status post right shoulder anterior dislocation and right-sided low back pain. He noted that claimant had a problem with his right shoulder in his distant past that had resolved with no residual complaints. He recommended that claimant be seen by an orthopedic surgeon, preferably one with a subspecialty interest in the shoulder region. Regarding claimant's low back complaints, Dr. Carabetta was unsure as to the specific mechanism by which claimant's back would have been injured. He also noted that the records of Dr. Fevurly mentioned that claimant had a couple of previous lower back injuries. Dr. Carabetta stated in his report:

> Causation will be an issue with which the court will have to struggle, but from a purely medical perspective, his lower back area complaints are in need of further assessment, regardless of causation. The examination does indeed show evidence of muscle spasm on the right side, consistent with the area of his pain complaints. Fortunately, the neurologic examination appears to be intact.[5]

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[3] *Garrity v. Bridges*, No. 1,052,823, 2011 WL 4011681 (Kan. WCAB Aug. 18, 2011).

[4] On December 13, 2011, this case was transferred from ALJ Klein's docket to ALJ Moore's docket.

[5] Dr. Carabetta IME report (filed June 28, 2012) at 4.

Claimant's attorney filed no response after receipt of Dr. Carabetta's report. Respondent's attorney sent a letter to the ALJ, dated June 28, 2012, asserting that claimant's need for medical treatment to his right shoulder and lower back was not related to the June 24, 2010, accident but was, instead, the result of preexisting conditions. Respondent further argued in its letter to ALJ Moore that since claimant allegedly did not complain of right shoulder problems to Dr. Fevurly during Dr. Fevurly's examination of December 2, 2011, claimant must have suffered an intervening injury between December 2, 2011, and June 22, 2012, the date claimant was seen by Dr. Carabetta, and that his right shoulder condition was caused by the intervening injury.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

K.S.A. 2010 Supp. 44-510h states in part:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> (b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any case, the

[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. . . .

When dealing with preexisting medical conditions, the test is not whether the accident at work caused or created the condition but, instead, whether the accident aggravated or accelerated the condition.[8] The Kansas Supreme Court in *Strasser* wrote in pertinent part:

> The workmen's compensation act prescribes no standard of health for workmen, and where a workman sustains an accidental injury arising out of and in the course of his employment he is not to be denied compensation merely because of a pre-existing physical condition, for it is well settled that an accidental injury is compensable where the accident serves only to aggravate or accelerate an existing disease or intensifies the affliction.[9]

It is respondent's burden to prove that an intervening injury was the cause of claimant's need for medical treatment to his right shoulder rather than the work-related accident.[10]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

In the July 9, 2012, Order, the ALJ found that claimant was in need of medical treatment for his right shoulder and low back. He further found that claimant had met his burden of proving that his right shoulder injury was work related but as for the low back,

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[8] *Strasser v. Jones*, 186 Kan. 507, 511, 350 P.2d 779 (1960).

[9] *Id.* at Syl. ¶ 2.

[10] See *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[11] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[12] K.S.A. 2011 Supp. 44-555c(k).

the ALJ held that claimant had failed to prove "that his need of additional treatment is causally related to his June 24, 2010 accident."[13]

The only evidence that has been added to the record following the June 24, 2011, order for medical treatment was the June 22, 2012, report by Dr. Carabetta.[14] The ALJ's Preliminary Hearing Order entered on May 10, 2012, appointing Dr. Carabetta as a neutral physician to perform an IME on claimant expressly asked Dr. Carabetta to "offer opinions as to the following: diagnosis and recommendations for treatment, if any."[15] The ALJ did not ask Dr. Carabetta to address causation. In his August 9, 2012, brief, claimant contends that the question of causation was not raised and was not an issue before the ALJ at the May 9, 2012, preliminary hearing. But since there was no record taken of that proceeding, this Board Member is unable to decide if causation was made an issue by respondent or if instead the ALJ raised the issue on his own. Nonetheless, it is clear that the independent medical examiner's report was not to address causation.

Dr. Carabetta, in his June 22, 2012, IME report, described claimant's "chief complaint" as low back pain. Claimant reported that there had been no change in the severity or location of his low back pain since his accident. Claimant also complained of right shoulder pain but indicated that those symptoms had improved to about a quarter of the original amount. Claimant related these symptoms, together with his groin pain from the hernia, to the accident on June 24, 2010. Dr. Carabetta determined that claimant was in need of additional medical treatment, in particular for his groin pain and right shoulder condition. With respect to the low back symptoms, Dr. Carabetta suspected a discogenic source. The doctor opined that "from a purely medical perspective, his lower back area complaints are in need of further assessment, regardless of causation."[16]

In this Board Member's Order of August 18, 2011,[17] which is incorporated herein by reference, the following was quoted from the report of Dr. Prostic:

> On or about June 24, 2010 through the last date of employment July 30, 2010, Robert W. Garrity sustained injuries to his spine, right shoulder and right groin. He has an inguinal hernia that should be repaired surgically. He has sustained sprains and strains of his cervical and lumbar spine without radiculopathy.

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[13] ALJ Order (July 9, 2012) at 1.

[14] The briefs refer to a December 2, 2011, report by Dr. Chris Fevurly. However, that report was neither offered into evidence and admitted into the record nor stipulated into the record by the parties. Furthermore, there is no mention of Dr. Fevurly's report in the ALJ's Order.

[15] ALJ Preliminary Hearing Order, (May 10, 2012) at 1.

[16] Dr. Carabetta's IME report of June 22, 2012, filed with the Division on June 28, 2012, at 4.

[17] *Garrity v. Bridges*, No. 1,052,823, 2011 WL 4011681 (Kan. WCAB Aug. 18, 2011).

> Only conservative care is indicated for the spinal injuries and will need to be deferred until after completion of treatment for his hernia.[18]

Although this Board Member determined claimant's injuries resulted from the single traumatic event that occurred on June 24, 2010, rather than from a series, the opinion of Dr. Prostic was that the lumbar spine was injured by the accident. Claimant has consistently related his back symptoms to the accident. Based on the record presented, the preponderance of the credible testimony is that claimant's low back was injured when he was tackled from behind and knocked to the ground on June 24, 2010.

Claimant also seeks review of the ALJ's decision to order respondent to provide claimant with the names of only two physicians rather than three. This suggests that the ALJ applied the version of K.S.A. 44-510h(b)(1) as amended in 2011 rather than the law that was in effect on the date of claimant's accident. The Board is without jurisdiction to decide this issue on an appeal from a preliminary hearing order.[19]

Finally, respondent contends claimant's right shoulder condition is not compensable because claimant had preexisting right shoulder problems and his current need for treatment is the result of an intervening injury. There is no persuasive evidence for the assertion of an intervening injury in the record. As to the shoulder injury being a preexisting condition, the prior dislocation claimant suffered was when he was in high school. Claimant was 49 years old when his shoulder was dislocated on June 24, 2010, by a full grown man tackling him from behind. All the evidence points to claimant's shoulder having been injured in that accident.

CONCLUSION

(1) Claimant's current need for medical treatment for his right shoulder and low back is a direct result of his June 24, 2010, work-related injury.

(2) Claimant did not suffer an intervening injury to his right shoulder.

(3) The Board does not have jurisdiction to review the ALJ's decision to order respondent to provide a list of two physicians rather than three.

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[18] P.H. Trans. (Apr. 13, 2011), Cl. Ex. 1 at 3.

[19] K.S.A. 44-534a(a)(2); K.S.A. 2010 Supp. 44-551(i)(2)(A).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated July 9, 2012, is modified to find that claimant is also entitled to medical treatment for his low back but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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